(18)



No. 97-634

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS, ET AL.,
*Petitioners,*

*v.*

RONALD R. YESKEY,
*Respondent.*

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

## PETITIONERS' REPLY BRIEF

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## ARGUMENT

### I. PRISON MANAGEMENT IS NOT JUST A TRADITIONAL STATE FUNCTION, IT IS ONE OF THE MOST FUNDAMENTAL ASPECTS OF STATE SOVEREIGNTY.

The appropriate outcome of this case turns on the fact that Pennsylvania has a sovereign right to manage its own prisoners. In apparent recognition of this fact, respondent and his amici have attempted to minimize Pennsylvania's interest to the point of absurdity. According to respondent, "while management of state prison inmates is a function traditionally performed by states, it is not a fundamental attribute of state sovereignty." (Respondent's Brief at 20). Nothing could be further from the truth. A state's autonomy in enforcing its

criminal code is a fundamental, *defining* aspect of sovereignty. *See Heath v. Alabama*, 474 U.S. 82, 89 (1985).

Foremost among a state's exclusive sovereign prerogatives is the power to create and enforce a criminal code, *id.* at 93, and maintaining prisons is an essential part of that sovereign power. *Procunier v. Martinez*, 416 U.S. 396, 412 (1974). Thus, each state has the independent ability to decide what conduct to criminalize and how severe the applicable penalty should be — up to and including death. *See Heath*, 474 U.S. at 89 (explaining that a sovereign has the inherent power to determine what constitutes an offense against its authority and to punish that offense).

States are sovereign entities, separate from both the federal government and each other. *Id.* To decide whether an entity is a separate sovereignty, this Court looks at whether the entity draws its authority to punish an offender from its own distinct source of power. *Id.* at 88. The authority to create criminal laws and punish offenders is a power each state possessed before joining the Union, and that power was reserved to them by the Tenth Amendment. *Id.* at 89; *United States v. Lanza*, 260 U.S. 377, 382 (1922). State sovereignty is rooted in these facts.

The states' power to enforce their criminal laws is so fundamental that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." *Heath*, 474 U.S. at 89 (quoting *Lanza*, 260 U.S. at 382). Likewise, two identical offenses are not the "same offense" within the meaning of the Double Jeopardy Clause if they are prosecuted by two different states. *Id.* at 92. This Court's decision in *Heath* illustrates just how fundamental this aspect of sovereignty really is to each and every state. In that case, the Court determined that a state has the power to sentence a person to death even though another state has already sentenced that person to life in prison for committing the very same murder.[1]

[1] Larry Gene Heath paid two men $2,000 to kill his wife, Rebecca, who was nine months pregnant. The assassins kidnapped Rebecca from her home in Alabama, shot her in the head, and left her corpse in Georgia. Heath was arrested in Georgia, where he pled guilty to murdering Rebecca in exchange for a life sentence. He was subsequently arrested by the Alabama authorities. Despite the earlier prosecution in Georgia, Heath was later convicted, in Alabama, for the same murder; this time, he received the death penalty. Heath's death sentence was upheld by this Court because Georgia and Alabama were deemed separate sovereigns. *Heath*, 474 U.S. at 88.



Pennsylvania's authority to punish those who violate its laws is distinct and independent from that of the federal government and every other state in our nation.[2] It is this crucial power which defines Pennsylvania as a sovereign entity. Inconceivably, respondent and his amici attempt to denigrate this fundamental aspect of sovereignty as a mere "traditional" state function. [3]

## II. TITLE II OF THE ADA TRULY IS AMBIGUOUS.

The state's operation and maintenance of prisons is part and parcel of its power to create a penal code and punish those who violate it. *See Procunier*, 416 U.S. at 412. The federal-state balance of power would clearly be altered by

[2] Pennsylvania first became a proprietary colony in 1681, and its provincial legislature passed the colony's first criminal laws in 1682. Harry Elmer Barnes, *The Evolution of Penology in Pennsylvania* 32 (1968). During its colonial period, Pennsylvania was not a sovereign entity because its laws could be vetoed by the British government. Staughton George, et al., *Charter to William Penn and Laws of the Province of Pennsylvania, 1682 — 1700* 85 (1879). Just a few weeks after the Declaration of Independence was signed in 1776, Pennsylvania's Constitutional Convention was convened. Pennsylvania became a sovereign entity when its constitution was ratified on September 28, 1776. Robert E. Woodside, *Pennsylvania Constitutional Law 567-68* (1985). In contrast, the federal government did not become a sovereign entity until June 21, 1788, when the federal constitution was ratified by nine states, including Pennsylvania, which was the second state to ratify the Constitution. *Id.* at 17.

[3] Citing *Turner v. Safley*, 482 U.S. 78, 84-85, 99-100 (1987), respondent argues that prison management must not be a "core" state function because "there always has been a place for federal oversight of state prisons." (Respondent's Brief at 21). Based on the Supremacy Clause, the federal *judiciary* obviously has the authority to intervene to correct violations of the federal constitution, but there has never been room for the federal government to engage in general *regulatory* oversight of how a state treats its own prisoners.

federal regulation of this sovereign function. In the absence of a clear congressional statement, Title II of the ADA cannot be applied to state prisoners. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Without repeating all of the arguments set forth in their opening brief, petitioners want to emphasize that the ADA is riddled with ambiguities about its application to state prisoners. Respondent supports his contrary contention with four arguments, none of which have merit.

*First*, Title II prohibits public entities from discriminating against the disabled by excluding them from, or denying them the benefit of, "services, programs, or activities." According to respondent, the terms "programs" and "services" are not ambiguous because Pennsylvania's Motivational Boot Camp Act refers to "programs" and "services." (Respondent's Brief at 11-12). Respondent completely misses the point that was made so cogently by the Fourth Circuit in *Amos v. Maryland Dep't of Pub. Safety and Correctional Services*, 126 F.3d 589 (4th Cir. 1997): The same word can have more than one meaning depending on the context in which it is used, and prison programs, activities, and services are different in kind than those provided to the public. *Amos*, 126 F.3d at 601. For this reason, Title II is ambiguous about its application to services, programs, and activities as those terms are understood within the unique setting of a state prison.

Respondent wants this Court to ignore that ambiguity, arguing that "the ADA does not apply only to 'services, programs, or activities'" because the second clause of § 12132 "affirmatively forbids a public entity from subjecting people with disabilities to discrimination generally." (Respondent's Brief at 12). The federal government makes a similar argument:

> [T]he anti-discrimination principle of Title II is not limited to the discriminatory exclusion of individuals from, or denial of the benefits of, "services, programs, or activities." Title II also provides that no qualified person with a disability shall "be subjected to discrimination by any such [public] entity." Thus, whether or not prisons provide "services, programs, or activities," they are prohibited from discriminating on the basis of disability by the concluding clause of Section 12132, a "catch-all phrase that prohibits all discrimination by a public entity."



(Brief of the United States at 9-10) (citations omitted). However, the true significance of the catch-all phrase in § 12132 is that it makes the statute even *more* ambiguous because the phrase is subject to two conflicting interpretations.[4]

Respondent and his amici believe the catch-all phrase means that a state and its agencies cannot discriminate against the disabled even if the particular agency does not provide any "services, programs, or activities." This is certainly one interpretation, but it is not particularly persuasive. Section 12132 provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. If respondent is correct, and Congress meant to outlaw all discrimination against the disabled — irrespective of any relationship to services, programs, and activities provided by the agency — then the words "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity" are superfluous and can be eliminated so that § 12132 reads as follows:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability . . . be subjected to discrimination by any such entity.

Yet, even under this revised version of § 12132, there is no proscription on general discrimination against the disabled.

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[4] According to *Merriam Webster's Collegiate Dictionary* 36 (10th ed. 1994), the word "ambiguous" means "doubtful or uncertain; inexplicable; capable of being understood in two or more possible senses or ways."

The statute only prohibits discrimination against a "qualified individual with a disability," which is defined as an individual who "meets the essential eligibility requirements for the receipt of *services* or the participation in *programs* or *activities* provided by a public entity." 42 U.S.C. § 12131(2) (emphasis added).

The most reasonable interpretation of § 12132 is that it only applies to services, programs, or activities provided by a state agency, but respondent and his amici interpret the provision to apply regardless of whether an agency provides any services, programs, or activities. These two conflicting interpretations demonstrate that the catch-all phrase of § 12132 renders the statute ambiguous about its application to state agencies, such as Pennsylvania's Department of Corrections, that do not provide the public with services, programs, or activities. This ambiguity is but one of several that plague the ADA.

*Second,* respondent argues that the term "qualified individual with a disability" is not ambiguous because it does not imply voluntariness and, therefore, does not exclude prisoners. (Respondent's Brief at 12). In making this assertion, respondent relies on the fact that Title II applies to other activities that a citizen may be compelled to participate in, such as education and jury duty. (Respondent's Brief at 13; *see also* Brief of the United States at 11).

Respondent's argument ignores the fact that the term "qualified individual" also implies the legal entitlement to receive a benefit or participate in a program, activity, or service so long as certain qualifications are met. Thus, the fact that individuals who are compelled to participate in certain activities may also be affected by Title II has no bearing on whether the statute applies to prisoners. Citizens are entitled to go to school and to serve as jurors and there are substantive limitations on the state's ability to deny participation in those activities. *Goss v. Lopez,* 419 U.S. 565, 573 (1975) (acknowledging a student's legitimate entitlement to a public education); *Batson v. Kentucky,* 476 U.S. 79, 87 (1986)



(recognizing a citizen's right not to be discriminated against in the jury selection process); *J.E.B. v. Alabama,* 511 U.S. 127, 141 (1994) (same).

In contrast, prisoners can never be "qualified individuals" as that term is commonly understood because state prisoners simply do not enjoy the entitlements available to the general citizenry. For example, the Thirteenth Amendment, which was ratified shortly before the Fourteenth Amendment, prohibits involuntary servitude for all persons *except* those subject to punishment for violating criminal laws. U.S. Const. amend. XIII. Under the Eighth Amendment, the state is entitled to punish any prisoner so long as the punishment is not cruel or unusual. U.S. Const. amend. VIII. Prisoners can be constitutionally subjected to conditions of confinement that are harsh and unpleasant. *Rhodes v. Chapman,* 452 U.S. 337, 347 (1981) (explaining that restrictive and harsh prison conditions are not unconstitutional).

In addition to punishment, prisoners may be denied privileges that would otherwise be available to any citizen. Prisoners can be denied the right to vote, removed from public office, denied the freedom to associate, denied visitation, denied full enjoyment of common First Amendment liberties, and prohibited from engaging in otherwise lawful and constitutionally-protected behaviors. *See Romer v. Evans,* 517 U.S. 620 (1996) (reaffirming proposition in *Davis v. Beason,* 133 U.S. 333 (1890) that convicted felon can be denied the right to vote); *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 132 (1977) (it is not unconstitutional for prison regulations to curtail the right of free association); *Kentucky Dep't of Corrections v. Thompson,* 490 U.S. 454, 464-65 (1989) (prisoner may be denied visitation rights).

Within the confines of the Constitution, states have the unfettered discretion to assign prisoners to any prison and to exclude them from programs and activities. *See Olim v. Wakinekona,* 461 U.S. 238, 249 (1983) (unless a state places substantive limitations on an official's discretion, it has not created a constitutionally-protected interest); *Moody v. Daggett,*

429 U.S. 78, 88 n.9 (1976) (prisoners have no entitlement to participate in rehabilitative program). With respect to services, a prisoner can expect that his basic human needs will be cared for, but he can expect no more. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) ("prison officials must ensure that inmates receive adequate food, clothing, shelter and medical care, and must 'take reasonable measures to guarantee the safety of the inmates'").

Under respondent's interpretation of Title II, disabled prisoners would be the *only* prisoners with a legal right to compel the benefits of, or the right to participate in, these state prison programs — a result that goes beyond prohibiting the state from discriminating against disabled prisoners. Title II would constitute an affirmative grant of substantive rights and benefits that no able-bodied state prisoner possesses. This ridiculous result underscores the fact that Congress could not have been speaking of prisoners when it used the words "qualified individuals."

*Third*, respondent argues that the name of Title II — Public Services — does not imply that it covers only those services provided to the general public because many public services are only provided "to those who meet certain selection criteria." (Respondent's Brief at 14). Respondent is mixing apples and oranges. It is absurd to think that prisoners are "selected" to receive a "public service."

*Fourth*, respondent argues that the ADA is not ambiguous in its application to inmates because both the ADA and prisons are geared toward rehabilitation. (Respondent's Brief at 14-15). In making this argument, respondent greatly exaggerates the importance of rehabilitation as an objective of state correctional systems and improperly elevates it to the level of the ADA's rehabilitative objectives.

In contrast to incarceration, the whole purpose of the ADA is to take individuals who, through no fault of their own, have been victimized by isolation and segregation and assimilate them into public life. On the other hand, the purpose of incarceration is to remove individuals from society with several objectives in mind — punishment or retribution, deterrence, incapacitation or public protection, and rehabilitation or reformation. John J. DiIulio, Jr., *Governing Prisons: A Comparative Study of Correctional Management* 260 (1987). Significantly, prisoners are not *victims* of their isolation; they *created* the circumstance that caused them to be segregated in the first place.



To rehabilitate prisoners, segregation and isolation serve as necessary tools to ensure their *eventual* reintegration into society. Under the ADA, current segregation is not part of *eventual* integration into public life; the goal is *immediate* assimilation. Thus, respondent's contention that the statutory goals of the ADA mirror those of the boot camp is flawed. In the boot camp, as well as traditional prisons, rehabilitation is directed toward *future* integration into society, whereas the ADA is intended to provide *current* integration. These are two very different objectives.

In addition to the four arguments discussed above, respondent and his amici attempt to bolster their position by a misleading analysis of Congress's use of the term "institutionalization" in 42 U.S.C. § 12101(a)(3). Essentially, they concede the fact that the term came directly from a report issued by the United States Commission on Civil Rights, which found that discrimination persists in critical areas, such as institutionalization. United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, at 159 (1983). However, respondent goes on to say that the "report specifically identified the criminal justice system, including prisons, as a setting in which disability discrimination occurs." (Respondent's Brief at 26-27). The ACLU, for example, claims that the "legislative history relied upon by Petitioners demonstrates that disabled prisoners were indeed among the institutionalized groups about whom Congress was concerned." (Brief of the ACLU at 9-10 n.6. *See also* Brief of National Advisory Group for Justice, et al. at 11; Brief of the United States at 28 n.11).

Respondent and his amici do not base their contentions on the text of the Commission's report. That report is divided

into two parts, and "Institutionalization" is analyzed in sections 2 and 4 of Part I. Chapter 2, "Discrimination Against Handicapped People," and chapter 4, "The Goal of Full Participation," are broken into sections which include discussions of the following topics: Education, Employment, Institutionalization, Medical Treatment, Sterilization, Architectural Barriers, Transportation, and Other Areas. In chapter 2, the topic "Institutionalization" contains a discussion of the problem of systematically placing disabled individuals in "large-scale residential institutions for handicapped people." United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities,* at 32 (1983). The "Institutionalization" portion of chapter 4 decries the fact that "segregating handicapped people in large, impersonal institutions is the most expensive means of care" and suggests that "alternative living arrangements allowing institutionalized residents to return to the community can save money." *Id.* at 78.

Respondent and his amici argue that the Commission's report also includes a discussion of prisons and prisoners. However, that claim is not based on the report itself, but on Appendix A to that report. That appendix is comprised of a list of some "major social and legal mechanisms, practices, and settings in which handicapped discrimination arises." United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities,* Appendix A at 165 (1983). Respondent and the ACLU point out various references to prisons and prisoners which are included in that list under the category pertaining to the criminal justice system. (Respondent's Brief at 26-27; Brief of the ACLU at 9-10 n.6). Respondent and his amici totally ignore the fact that the category involving the criminal justice system is completely separate from the one dealing with institutions. *See* United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities,* Appendix A at 166, 168 (1983). Moreover, the preamble to Appendix A explicitly states that the "items listed are issue areas in which problems of discrimination occur, however, *no implication is intended that the listed practices are necessarily discriminatory." Id.,* Appendix A at 165 (emphasis added).



The conclusions in the Commission's report include a finding that serious and pervasive discrimination against the disabled persists in such critical areas as "education, employment, institutionalization, medical treatment, involuntary sterilization, architectural barriers, and transportation." *Id.* at 159. The criminal justice system — including prisons, prisoners, and detainees — is noticeably absent from this list.

In § 12101(a)(3), Congress explicitly found that persistent discrimination exists in all of the categories delineated in the Commission's conclusions, except for involuntary sterilization. Congress also found persistent discrimination in some of the other categories contained in the Commission's appendix, such as voting and housing, but Congress chose *not* to include the criminal justice system in § 12101(a)(3) — even though prisons and prisoners were specifically included in that category of the appendix. Under the circumstances, it is difficult to fathom how respondent and his amici can contend that the term "institutionalization" has *anything* to do with prisons or prisoners.

## III. INCLUDING STATE PRISONERS WITHIN THE SCOPE OF TITLE II'S PROTECTIONS IS AN UNCONSTITUTIONAL INTERPRETATION OF THE ADA.

As both respondent and the federal government concede, this Court must interpret statutes in light of the Constitution. (Respondent's Brief at 19; Brief of the United States at 19-20 n.6). Petitioner does not suggest that this Court hold that the ADA is unconstitutional per se; rather, if the ADA is read as respondent suggests, it will be unconstitutional. Congress does not have the power under the Fourteenth Amendment or the Commerce Clause to apply Title II of the ADA to state prisoners.[5]

[5] This is not to say that the rights of disabled prisoners will go unprotected. As Professor Hamilton recently pointed out, "There is no vacuum of power outside Congress's limited powers. Rather, when it exceeds its limited powers, it strays into domains reserved for other branches, the states, or the people." Marci A. Hamilton, *City of Boerne v. Flores: A Landmark for Structural Analysis, 39* Wm. & Mary L. Rev. 699, 709 (1998).

### A. The Fourteenth Amendment

Respondent and his amici maintain that Congress was authorized to enact Title II of the ADA under its power to enforce the Fourteenth Amendment. They argue that the ADA is legislation that is necessary and proper to remedy and deter unconstitutional discrimination against the disabled. (Respondent's Brief at 35-36; Brief of the United States at 22).[6]

Section 5 of the Fourteenth Amendment gives Congress the power to remedy *constitutional* violations; it does not give Congress the power to create new substantive rights unless they somehow remedy a constitutional violation. *City of Boerne v. Flores,* 117 S. Ct. 2157 (1997) (striking down the Religious Freedom Restoration Act — "RFRA" — as an unconstitutional exercise of Congress's power to enforce the Fourteenth Amendment). *Compare South Carolina v. Katzenbach,* 383 U.S. 301, 308 (1966) (upholding remedial provisions of the Voting Rights Act of 1965 to "banish the blight" of almost 100 years of racial discrimination in voting) *with Oregon v. Mitchell,* 400 U.S. 112, 118 (1970) (concluding that Congress had exceeded its enforcement authority by lowering the minimum voting age in state and local elections from 21 to 18).

Respondent mistakenly believes that Congress can raise the level of judicial scrutiny without changing the substantive meaning of a constitutional right. (Respondent's Brief at 39). What respondent fails to recognize is that raising the level of judicial scrutiny *necessarily* expands the substance of a constitutional right by protecting an individual from conduct that would otherwise be constitutional. In this regard, petitioners recognize that "legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *City of Boerne,* 117 S. Ct.

[6] As this Court pointed out in *Printz v. United States,* 117 S. Ct. 2365, 2378 (1997), the Necessary and Proper Clause is the "last, best hope of those who defend *ultra vires* congressional action."



at 2163; *South Carolina v. Katzenbach,* 383 U.S. at 308 (finding that the "pervasive evil" of racial discrimination in voting was remedied through elimination of literacy tests that were otherwise constitutional). Thus, Congress can outlaw otherwise constitutional conduct, *provided* that the legislation is needed to remedy some *constitutional* violation.[7] *See City of Rome v. United States,* 446 U.S. 156, 177 (1980) (holding that Congress could prohibit certain electoral schemes that were not unconstitutional themselves but that were discriminatory in effect).

Respondent and his amici argue that Title II of the ADA was needed to remedy violations of the equal protection clause. However, Title II does not remedy such violations because disabled people are not a suspect class for which the Constitution requires mandatory accommodation. Congress may be able to give disabled individuals statutory rights that exceed those granted by the equal protection clause, but it may not do so under the guise of enforcing constitutional rights that do not exist.

In *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432 (1985), this Court refused to recognize the disabled as a suspect or quasi-suspect class,[8] setting the outer bounds of Congress's remedial power to protect them from unconstitutional discrimination. In *Turner v. Safley,* 482 U.S. 78 (1987), this Court determined that even when the highest level of scrutiny would otherwise apply, prison regulations are valid as long as

[7] In arguing that the ADA should be "upheld as a valid exercise of Congress's Section 5 power if there is a 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,'" the federal government is putting the cart before the horse. (*See* Brief of the United States at 22). The *first* inquiry is whether there is a constitutional violation to be prevented or remedied. If the injury being prevented or remedied does not rise to the level of a constitutional violation, the means adopted to address that end are irrelevant.

[8] Although *City of Cleburne* specifically dealt with the mentally disabled, it identified the disabled generally as a nonsuspect class for purposes of equal protection analysis. 473 U.S at 445-46.

they bear a reasonable relationship to a legitimate penological interest. *Turner*, 482 U.S. at 89.[9]

Just as RFRA attempted to make a substantive alteration of this Court's holding in *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), Title II's application to state prisoners would make a substantive alteration to this Court's holdings in *City of Cleburne* and *Turner*. RFRA's similarity to the ADA is striking. Both purportedly establish greater rights for individuals by increasing the judicial scrutiny of state action to a level higher than this Court has deemed appropriate.

The ADA heightens judicial scrutiny applicable to actions affecting disabled persons by requiring a closer nexus between the governmental purpose and the governmental means than presently exists under the rational basis test. The ADA mandates an affirmative justification for any state action that incidentally burdens the disabled, a nonsuspect class. A state's actions are no longer presumptively valid despite a rational relationship to a legitimate state interest. Even if the state's chosen policy passes the rational basis test, it will not be validated by the courts unless the state can affirmatively prove that it cannot make an accommodation without altering the fundamental nature of its programs, activities, and services. This searching judicial scrutiny is incompatible with the less onerous rational basis test.

The same problems that this Court found insurmountable in RFRA also pervade Title II of the ADA. *See City of Boerne*, 117 S. Ct. at 2171. In striking down RFRA, this Court might as well have been speaking about the ADA. *See, e.g., Coolbaugh v. Louisiana*, No. 96-30664, 1998 U.S. App. LEXIS

[9] There are two reasons for this judicial restraint. First, prison administration is a task that has been committed to the legislative and executive branches of government. *Turner*, 482 U.S. at 85. Thus, with respect to federal prisons, deference must be given to Congress and the Department of Justice. With respect to state prisons, however, this Court has recognized that our federalist system provides an additional reason for deference to state prison administrators. *Id.* Thus, state prison management should be left to the *state* legislative and executive branches of government.



3199, at *31 (5th Cir. Feb. 27, 1998) (Smith, J., dissenting). RFRA was not a constitutional exercise of Congress's power to enforce the Fourteenth Amendment, and neither is Title II of the ADA.

### B. The Commerce Clause

Even though Title II of the ADA does not constitute an appropriate exercise of Congress's power to enforce the Fourteenth Amendment, it is not necessarily unconstitutional in its entirety. When applied to many public services, Title II may be a constitutional exercise of Congress's powers under the Commerce Clause. However, Title II cannot be constitutionally interpreted in a way that authorizes federal regulation of state prison management, a noncommercial activity that does not substantially affect interstate commerce.

Contrary to respondent's contention, Pennsylvania's boot camp is not "specifically designed to reintegrate prisoners into the stream of commerce." (Respondent's Brief at 46). The boot camp is specifically designed to (1) reduce the number of individuals who commit drug and alcohol related crimes, which is a primary cause of prison overcrowding; (2) eliminate insurrection and prison rioting, which are caused by overcrowding; and (3) reduce criminal behavior by exploring alternative methods of incarceration. Pa. Stat. Ann. tit. 61, § 1122 (West Supp. 1997). In fact, a state's management of its prisoners has no substantial effect on interstate commerce that is "visible to the naked eye." *See United States v. Lopez*, 514 U.S. 549, 562 (1995).

Like the federal government's argument that was rejected in *Lopez*, one cannot conclude that prison management and inmate classifications substantially affect interstate commerce without piling inference upon inference upon inference. *See id.* at 567. Respondent does not bother to explain the basis for his conclusion that assignment to Pennsylvania's boot camp substantially affects interstate commerce. However, it is only through a tortured process of conjecture that one can reach the theoretical conclusion that a prisoner's assignment to the boot camp may *ever* substantially affect interstate commerce.

That speculative hypothesis requires one to start with the premise that assignment to the boot camp gives an individual the opportunity to receive drug and alcohol treatment, intensive discipline and regimentation, continuing education, vocational training, prerelease counseling, engage in rigorous physical activity, and work on public projects. From that point forward, a long series of facts must be assumed, although those events may never take place.

To begin with, it must be taken for granted that the inmate will successfully complete the boot camp's requirements because he has received the education, discipline, regimentation, training, and counseling provided in the boot camp. If he does complete those requirements, the inmate will be paroled and released into the local community under the supervision of the Board of Probation and Parole. One must assume that, as a result of the drug and alcohol treatment the inmate received at the boot camp, he will not use those substances after he is released into free society. Inasmuch as he probably will not use those substances anymore, the parolee should not test positive on random drug or alcohol tests conducted during the period of parole supervision. Because the individual received intensive discipline and regimentation and was required to engage in rigorous physical activity, he will — hopefully — have developed a sense of personal responsibility, self-discipline, and respect for others. Theoretically, these qualities, combined with the fact that he no longer uses drugs or alcohol, will prevent the individual from committing another crime and being returned to prison. Ideally, since the individual has received continuing education, vocational training, and prerelease counseling at the boot camp, he will have learned the skills and work ethic necessary to find and maintain a job, which will have an incidental effect on interstate commerce. Eventually, if enough inmates successfully complete the boot camp and become more productive citizens, the effect on interstate commerce might conceivably be a substantial one.

If this type of logic can be used to find that participation in the boot camp substantially affects interstate commerce,



then Congress would also have the power to dictate the boot camp's eligibility requirements. By dictating eligibility requirements, Congress would be able to change the sentencing alternatives available for violations of state law. This is a slippery slope that directly threatens the vital balance of power between the state and federal governments. In *Lopez*, this Court rejected nearly identical reasoning because, otherwise, it would be "hard-pressed to posit any activity by an individual that Congress is without power to regulate." *Lopez*, 514 U.S. at 564. This case is virtually indistinguishable from *Lopez*, and the federal government has not even attempted to distinguish this case from that one. (*See* Brief of the United States at 20-21 n.7). This Court should not allow Congress to use its Commerce Clause powers to invade a fundamental area of state sovereignty which has no substantial effect on interstate commerce.

## CONCLUSION

For the foregoing reasons, in addition to those set forth in their opening brief, petitioners respectfully ask this Court to reverse the decision of the lower court and remand with instructions to affirm the judgment of the district court, which dismissed this action in its entirety.

Respectfully submitted,

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